

¶100 Introduction to the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) sets minimum wage, overtime pay, equal pay, recordkeeping, and child labor standards for employees who are covered by the act and are not exempt from specific provisions. It is a federal law, enacted by the United States Congress in 1938. This introduction will provide a general overview of the FLSA and its enforcement by the U.S. Department of Labor (DOL), with subsequent sections of the *Handbook* exploring these requirements in greater depth.

Adopted in 1938 as a means of economic recovery from the Great Depression, the FLSA sought to ensure a maximum number of jobs which paid a minimum, livable wage. By requiring overtime pay, the FLSA created a monetary penalty for employers who did not spread their existing work among a greater number of employees; it provided an incentive to hire more people rather than increase the hours worked by existing employees.

Under the FLSA, there is an important distinction between employees who are not covered by the act and those who are exempt from any or all of the act's provisions. Employees who are not covered are outside the authority of the FLSA. For example, an employee who performs services in a workplace in a foreign country is *not* covered by the act (*Hornstein v. Negev Air Base Constr.*, 110 A.D. 2d 884 (N.Y. App. Div. 1985)). Exempt employees are covered by the FLSA, except for the specific exemptions from coverage which apply to their occupations. Thus, for example, exempt employees are subject to the equal pay provisions, even if they are exempt from the minimum wage and overtime provisions.

No provision of the FLSA will excuse noncompliance with any state law or municipal ordinance establishing a minimum wage higher than the federal minimum wage established by the FLSA.

The administration and enforcement of the FLSA and related statutes are the responsibility of DOL. Within DOL, the Wage and Hour Division of the Employment Standards Administration has authority for the FLSA. This division issues rules, regulations, and interpretations under the act and conducts inspections and investigations to determine compliance (¶190).

¶101 Application of the FLSA to State and Local Governments

Initially, the Fair Labor Standards Act applied only to private employers directly engaged in commerce. Government employees were added to FLSA coverage by amendments to the act in 1966 and 1974. In 1966, coverage was extended to school, hospital, nursing home and local transit employees. This expansion of the FLSA was challenged in the courts and ultimately upheld by the U.S. Supreme Court (*Maryland v. Wirtz*, 392 U.S. 183 (1968)), which specifically held that the application of federal minimum wage and overtime laws to state and local governments was constitutional.

The U.S. Constitution's 11th Amendment provides states and their agencies with general immunity from suits brought by individual citizens. In the aftermath of *Maryland v. Wirtz*, the Supreme Court ruled in 1973 in *Employees of the Dep't of Public Health and Welfare v. Missouri*, 409 U.S. 1103, that this

¶200 Exempt and Non-Covered Employees

Not all employees of state and local governments are affected by the Fair Labor Standards Act (FLSA). Certain employees simply are not covered by the act (i.e., non-covered employees). Other employees, while covered by the FLSA, are exempted by specific provisions of the act (i.e., exempt employees).

Non-covered employees include elected officials (¶211) and their personal staffs (¶212), policy-making appointees (¶213), legal advisors (¶214), legislative employees (¶215), bona fide volunteers (¶216), independent contractors (¶217), prisoners (¶218) and certain trainees (¶219). Exempt employees generally fall into three major categories: executive (¶230), administrative (¶240) and professional (¶250). Also certain seasonal recreational employees can be considered exempt (¶260) from specific provisions.

Application of the exemptions to school, special district, health care, and data processing and other categories of employees are discussed at ¶300.

other legislative branches. DOL regulations (29 C.F.R. §553.12(b)) also make clear that employees of school boards, other than elected officials and their appointees, are covered employees entitled to FLSA protection.

¶216 Bona Fide Volunteers

In 1985 Congress enacted legislation to clarify the issue of compensation for so-called "volunteers." The amendment to the FLSA (29 U.S.C. §203(e)(4)(A)) reads as follows:

the term "employee" does not include any individual who volunteers to perform services for a public agency which is a state, a political subdivision of a state, or an interstate governmental agency, if—

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency.

A volunteer is generally defined as an individual who performs hours of service for a public agency for civic, charitable or humanitarian reasons. Moreover, a volunteer performs these services without promise, expectation or receipt of compensation for services rendered. If these conditions are met, an individual will not be subject to the FLSA (29 C.F.R. §553.101(a)). If the economic reality, however, indicates the ostensible volunteer is really an employee, dependent on the employer, then the FLSA applies (*Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)).

Public employee volunteers

As the 1985 amendments state, an individual may not be a volunteer for a public agency when the volunteer hours involve the *same type* of service which the individual is employed to perform for the *same agency*. For example, in a Feb. 19, 1992, letter, a county detention officer (jailor) wanted to volunteer as a reserve deputy sheriff. DOL concluded that a detention officer, who is engaged in public safety functions, would be performing similar services to those performed by a deputy sheriff. Similarly, in a Feb. 22, 1992, letter DOL also concluded that a county reserve officer could not volunteer as a law enforcement officer for the county during off-duty hours (see also Wage and Hour Opinion Letters dated Sept. 26, 1992, July 16, 1991, April 10, 1990, Jan. 29, 1990, May 3, 1990, and April 16, 1990).

One issue that may arise under this section is determining whether two agencies of the same state or local government constitute the same or separate public agencies. According to DOL, this issue will be determined on a case-by-case basis. One factor that will be considered by DOL is how the agency is treated for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce (29 C.F.R. §553.102(b)). Since DOL has determined that such issues will be resolved on a case-by-case basis, it would be wise for any public employer considering this issue to request a Wage and Hour Opinion Letter.

Another important issue when considering public employee volunteers is determining whether or not the employee is providing the *same type of services* which the individual is employed to perform for the

same agency. Individuals may not volunteer to do what they are otherwise paid for. Among other criteria, DOL will consider:

- (1) the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles*; and (2) the facts and circumstances in a particular case, including whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee 29 C.F.R. §553.103(a)

Once again, because of the vagueness of the DOL criteria, any public employer in doubt as to whether a public employee volunteer is performing the same services which he or she is otherwise employed to do is advised to seek a Wage and Hour Opinion Letter.

In an effort to clarify the provisions, DOL has provided examples of when services constitute the "same type of services." For instance, the following employees would *not* be considered volunteers according to 29 C.F.R. §553.103(b)(c):

- (1) A nurse employed by a state hospital who volunteers nursing services at a state operated clinic (which is not a separate agency)
- (2) A firefighter volunteers as a firefighter at the same public agency

For example, in an Oct. 5, 1987, Wage and Hour Opinion Letter, a fire department wanted to know if firetruck drivers in the same district could volunteer the same or similar work during their off-duty hours. DOL explained that because §203(e)(4)(A)(ii) of the FLSA does not allow individuals to volunteer the same or similar duties for the public agency that employs them, the firetruck drivers could not work additional time without the work being counted and paid for in compliance with the FLSA (see also Wage and Hour Opinion Letters, Nov. 7, 1994, and April 9, 1995). However, in a Jan. 2, 1988, letter, DOL stated that a firefighter may volunteer the same services for a *different* public agency in another jurisdiction. (See also Wage and Hour Opinion Letters dated April 21, 1987, March 28, 1987, and Aug. 7, 1989.)

On the other hand, the following employees would not be engaged in volunteering the "same type of services," and thus would be considered bona fide volunteers:

- (1) A city police officer who volunteers as a part-time referee in a city basketball league.
- (2) An employee of the city parks department who serves as a volunteer city firefighter
- (3) An office employee of a city hospital who volunteers to spend time with a disabled or elderly person in the same institution during off duty hours

In several Wage and Hour Opinion Letters, DOL emphasized that public employees can volunteer for the same agency that employs them if the volunteer position is substantially different from their paid work. A May 7, 1986, Wage and Hour Opinion Letter addressed a case in which a public high school's full-time custodian was prohibited by the school from working as an assistant baseball coach. The Wage and Hour Division noted that the facts in the letter clearly indicated that the custodian was volunteering his coaching services and could continue to coach without fear of losing his volunteer status. A police department in an Oct. 21, 1987, Wage and Hour Opinion Letter asked if civilian members (such as switchboard operators or record clerks) of the department could volunteer their services as reserve police officers without the public agency incurring overtime compensation liabilities. DOL, citing §553.103 of

*¶400 Hours Worked and Compensation

Introduction

All employees covered under the Fair Labor Standards Act (FLSA) must be paid a minimum wage (¶110) for all hours worked (¶130). While bona fide volunteers (¶216) and some trainees (¶219) are not employees and need not be paid, most others are entitled to pay. With the exception of the worker categories not covered by or exempted by the FLSA, or variations permitted by the act, all employees must be paid at least the minimum wage. Understanding exactly what constitutes “hours worked” is essential in determining an employee’s compensation and compliance with both minimum wage and overtime requirements of the act.

Employment, under the FLSA, is broadly defined to include all hours that an employee is “suffered or permitted to work” for the employer (29 U.S.C. §203(g)). Hours worked also include time during which an employee is “necessarily required to be on the employer’s premises, on duty or at a prescribed work place” (29 C.F.R. §785.7). This broad definition of hours worked may require that an employee be compensated for time the employer does not otherwise consider “working time” such as travel time (¶¶470-476), waiting time (¶¶420-422), and certain meal (¶441), rest (¶442) and sleep (¶¶450-453) periods. The courts and DOL, however, have developed a *de minimis* rule whereby short periods of time (*e.g.*, a few minutes) may be disregarded in calculating working time (¶402).

Frequently, the issue of working time arises in the context of calculating overtime compensation. For example, if an employee normally works eight hours per day Monday through Friday but takes Wednesday as a sick day, must the employer pay for overtime if the employee works eight hours on Saturday of that week? The simple answer is no. Under the FLSA, overtime need only be paid for all hours *worked* in excess of 40 in a week. Since the employee *worked* only 32 hours in this week, an additional eight on Saturday will not subject the employer to overtime liability. This is the case even if the sick day (vacation, holiday, snow emergency day, etc.) is paid. However, if an employer is subject to an employment contract or collective bargaining agreement that calls for calculating sick days as compensable working time, the employer is, of course, obligated to follow the terms of the agreement (see ¶407). And, of course, state laws may require overtime be paid on a different basis than the FLSA, at least in the private sector (*e.g.*, California, Alaska).

A more detailed discussion of “compensable” and “noncompensable” working time can be found below.

¶401 Historical Overview

The concept of “hours worked” is a crucial determining factor in complying with the FLSA. According to the U.S. Supreme Court, an employee must be compensated for “all time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business” (*Tennessee Coal, Iron & R.R. Co. v. Muscoda Local*

*Indicates new or revised material.

¶410 Unauthorized Work

Employees who, with the knowledge or acquiescence of their employer, continue to work after their shift is over, albeit voluntarily, are engaged in compensable working time. The reason for the work is immaterial; as long as the employer “suffers or permits” employees to work on its behalf, proper compensation must be paid (29 C.F.R. §785.11).

Essentially, this means that once an employer allows the employee to work, or *knows* that the employee is working, then the employee *must* be compensated. This is true whether the work is being performed at the place of business or at home. Permitting off-the-clock work, however, is not itself prohibited by the FLSA. A violation occurs when, as a result of unreported hours worked, an employee’s average wage for a pay period falls below the minimum wage (*Cuevas v. Monroe Street City Club*, 752 F. Supp. 1405, 1417 (N.D. Ill. 1990)). Similarly, a violation also occurs if, as a result of off-the-clock work, an employee is not paid for hours worked in excess of 40 hours in a workweek.

Management must make certain that regular time and overtime work it does not want performed is not in fact performed. Mere promulgation of a rule to that effect is not sufficient to avoid compensation for additional hours worked (29 C.F.R. §785.13). Moreover, an employee’s violation of the employer’s rules is not a *per se* bar to recovery. If the employer has reason to believe that an employee is submitting inaccurate time cards, the employer may be liable to pay for additional overtime hours (*Newton v. City of Henderson*, 47 F.3d 746 (5th Cir. 1995)). Similarly, where a police department makes officers responsible for the cleanliness of their motorcycles and prohibits officers from cleaning motorcycles on their own time, but does not provide sufficient facilities for cleaning the motorcycles, the police department will be liable if the officers clean the motorcycles in their off time (Wage and Hour Opinion Letter, Dec. 30, 1985).

Some employer practices may heighten their risk of exposure to claims for additional compensation. For example, in one case, employees successfully argued that their employer knew that its productivity goals could not be met without working off-the-clock (*Tew v. Food Lion, Inc.*, 756 F. Supp. 238 (E.D.N.C. 1991), *aff’d sub. nom.*, *Lyle v. Food Lion, Inc.*, 954 F.2d 984 (4th Cir. 1992)). In that case, there was clear evidence that the employees had been working off-the-clock, including a manager’s telling them, “Don’t get caught — if you get caught, they will bust you.” The employees also had keys to the store so that they could work beyond their scheduled hours (756 F. Supp. at 240).

The case of “unauthorized work” should be contrasted with the case of bona fide “volunteers” who intentionally furnish services to a state or local government with no intention of being paid (¶212).

[The next page is Tab 400, page 31.]

failed to reach compensatory time agreements with the employees' designated representatives (*Nevada Highway Patrol Association v. Nevada*, 899 F.2d 1549 (9th Cir. 1990); *Local 2203 v. West Adams County*, 877 F.2d 814 (10th Cir. 1989)).

But the Supreme Court agreed with the 4th, 5th and 11th Circuits, finding that the FLSA was not violated when the employer failed to recognize employees' representatives for purposes of negotiating an agreement governing the use of compensatory time when state law prohibited collective bargaining agreements with public employees (*Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) (en banc); *Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), cert. denied, 493 U.S. 1051 (1990)); *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989)).

The Supreme Court in *Moreau* agreed with the county's argument that the U.S. Department of Labor (DOL) never intended that state and local laws be disregarded in determining whether a representative is recognized for the purposes of reaching a comp time agreement. Though DOL's regulations, when read in isolation, seem to buttress the deputy sheriffs' argument that the representative need not be a recognized agent, such an "interpretation would prohibit entirely the use of comp time in a substantial portion of the public sector," said the Supreme Court.

After many years of disagreement among the circuit courts, the Supreme Court has provided guidance on how public employers in states that prohibit collective bargaining with public employees must proceed when employees have designated a representative for purposes of negotiating a compensatory time agreement. In states with prohibitions, public employers may now enter into individual comp time agreements with confidence. In states where no such prohibitions apply, employers should reach compensatory time agreements with the employees' representative.

Compensatory time accrual caps

The compensatory time earned by an employee constitutes a legal liability for the employing jurisdiction. Employees generally may accrue up to 240 hours of compensatory time; since compensatory time is accumulated at time and one-half, this is only 160 hours of actual overtime work. Employees who work in a public safety activity, emergency response activity or seasonal activity may accumulate up to 480 hours of comp time. As long as some of the employee's work *regularly includes* activities subject to the 480-hour cap, the employee is covered by the higher cap (see House Report 99-331, 99th Cong. 2nd Sess. 21 1985). Employers are expected in good faith to resist the temptation to assign clerical employees to an afternoon of snow shoveling or ambulance crew work merely to bump them to the higher compensatory time cap.

The question of who is a seasonal employee may prove particularly troubling. The legislative history gives the following guidance (*Id.* at 22):

Considerable focus has been given to the question of seasonal activity. Seasonal activity is not limited strictly to those operations that are very susceptible to changes in the weather. Obviously, parks and recreation activity in general are primarily seasonal since they experience peak demand during fair

weather seasons or other sport seasons and largely dormant periods at other times. Road crews, while not necessarily seasonal workers, may nevertheless have significant periods of peak demand, for instance during the snow plowing or road construction season. In such an instance the snow plow operator/road crew employee would be able to accrue compensatory time to the higher cap, while other employees of the same department who do not have lengthy periods of peak seasonal demand would remain under the lower cap. Auditoriums, theaters, and sports facilities that are open for specific limited seasons, would meet a seasonal test; facilities that operate year round would not. Mere periods of short but intense activity do not make an employee's job seasonal in nature; therefore, clerical employees working increased hours for several weeks on a city budget or processing insurance forms or tax notices would not need the higher compensatory time cap since the limited periods of increased activity could be accommodated within the lower limit. In determining which employees would be considered seasonal, the Secretary of Labor should first determine whether the "seasonal activity" is a regular and recurring aspect of the employees' work and then whether the projected overtime hours during the "season" of significantly increased demand exceeds the number of compensatory time hours available under the lower cap.

The regulations seek to further define which employees may legitimately use the higher 480-hour cap. Accordingly, the regulations define "public safety," "emergency response" and "seasonal activity" employees as follows (29 C.F.R. §553.24(c)-(e)):

Public Safety: includes personnel engaged in law enforcement, firefighting or related activities. The 480-hour accrual limit does *not* apply to office personnel or other civilian employees who perform public safety activities in emergency situations, even if they spend substantially all of their time in a particular week on public safety activities. (Note that public safety employees may also be eligible for a partial overtime exemption under §207(k); see Tab 600.);

Emergency Response: includes dispatching of emergency vehicles and personnel, rescue work and ambulance service personnel. Once again, an employee must regularly engage in emergency response activities to be covered by the 480-hour cap. (Note that certain emergency response employees may also qualify for the §207(k) exemption; see Tab 600.);

Seasonal Activity: includes work during periods of significantly increased demand that are of a regular and recurring nature. There are two considerations in determining whether employees are engaged in seasonal activity: first, whether the activity is a regular and recurring aspect of the employee's work and, second, whether the projected overtime hours during the period of significantly increased demand are likely to result in the accumulation of more than 240 compensatory time hours.

It should be noted that employees who transfer from one of these three job classifications to a position subject to the 240-hour limit may carry over to the new position any accrued compensatory time. The employee, however, must be compensated in cash wages for any subsequent overtime hours worked until the number of accrued hours of compensatory time falls below the 240-hour limit (29 C.F.R. §553.24(b)).

Use of accrued compensatory time

An employee who has accrued compensatory time and requests use of the time must be permitted to use the time off within a "reasonable period" after making the request if it does not "unduly disrupt" the operations of the agency (29 U.S.C. §207(o)(5)). The question of what is unduly disruptive may prove

troubling for employers. The legislative history (House Report 99-331, 99th Cong. 2nd Sess.) gives the following guidance:

Use of the term "reasonable" is intended to accommodate varying work practices based on the facts and circumstances of each case. When an employer receives such a request for the use of compensatory time, that request should be honored unless to do so would be unduly disruptive. By the term "unduly disruptive," the Committee means something more than mere inconvenience. For example, a request by a snow plow operator in Vermont to use 40 hours of compensatory time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June or hunting season probably would not be unduly disruptive.

Undue disruption of operations is the *only* legitimate reason for denying compensatory time leave, according to a Wage and Hour Opinion Letter dated Aug. 19, 1994. That letter also explains that an undue disruption must be more than inconvenience to the employer. Also, the letter says, the fact that the employer will have to pay an overtime premium to a substitute is not a legitimate reason for denying leave.

DOL emphasizes in its regulations that compensatory time is not to be used as a means of avoiding statutory overtime compensation. Therefore, an employee has a right to use the compensatory time earned and must not be coerced to accept more compensatory time than an employer can realistically, and in good faith, expect to be able to grant (29 C.F.R. §553.25(b)).

*But while the FLSA contains a provision (29 U.S.C. §207(o)(5)) addressing an employer's general obligation to honor employee requests to use comp time, the statute is less clear on whether an employer can exercise control over a worker's accrued comp time by *requiring* the employee to use it at certain times. Prior to 2000, federal circuit courts were split on the issue. The 8th U.S. Circuit Court of Appeals, for example, ruled in *Heaton v. Moore*, 43 F.3d 1176 (1994), that employers *do not* have the right to force employees to use accrued comp time. Meanwhile, the 9th U.S. Circuit Court of Appeals, in *Collins v. Lobdell*, 188 F.3d (1999), affirmed an employer's right to compel use of such time. In May 2000, the U.S. Supreme Court resolved the issue, holding that "[n]othing in the FLSA or its implementing regulations prohibits a public employer from compelling the use of compensatory time." Thus, the High Court found, upholding a ruling by the 5th U.S. Circuit Court of Appeals, a Texas county did not violate the act by forcing its deputy sheriffs to use accrued comp time, even though the employer had not entered an agreement with the workers permitting such a practice (*Christensen v. Harris County*, 120 S. Ct. 1655 (May 1, 2000)).

Even in instances where a compensatory time agreement has been formulated, an employer may freely substitute cash, in whole or in part, for compensatory time. Such a substitution will not affect subsequent granting of compensatory time off in future workweeks or work periods (29 C.F.R. §553.26).

One important issue that arises with respect to compensatory time off in lieu of cash overtime is payment for unused compensatory time in the event that an employee leaves the public agency. According to DOL regulations (29 C.F.R. §553.27(b)), payments for accrued compensatory time earned after April 14,

*Indicates new or revised material